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Congress shall make no law...

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Supreme Court to Rule on Biennial Contribution Limits

Center's friend of the court brief urges court to "put teeth" in standard of review

The Supreme Court will hear oral arguments October 8 on a campaign contribution limits case known as *McCutcheon v. FEC* that speech censors fret could be the next *Citizens United* in its affirmation of First Amendment protections. We hope they are right.

The Center for Competitive Politics (CCP) filed a friend of the court brief on the case urging the justices to rule for McCutcheon, and in doing so, put teeth into standards of review regarding laws regulating political speech.

CCP's brief suggests that courts mistakenly grant excessive deference to Congress, whose members have a vested self-interest in restricting speech about their performance in office and have "often shown considerable ignorance of the nation's campaign finance laws." The brief quips that "Some members of Congress may be conniving, and others ignorant." From the brief:

> Such deference is mistaken in this case, and should be reconsidered generally. Where, as here, the Congress failed to generate any substantive record to justify its legislative approach, the rationale for judicial deference collapses. Moreover, such deference substantially increases the likelihood that legislative action will disproportionately serve the interests of incumbent politicians. Finally, the premise undergirding deference to legislative pronouncements in this area – that legislators actually possess expertise in the area of campaign finance – may be fundamentally mistaken.

The brief cites a law journal article written by Robert Bauer, a noted campaign-finance attorney who served as General Counsel of Obama for America and as the President's White House Counsel. In the article Bauer notes that "The problem is not simply that, in a critique of their own involvement with political money, officeholders may be tempted to rig the game for their own purposes. There is also the fair possibility that, even if they do the best they can, their biases will taint, if not wholly disqualify, the effort. "

Under McCain-Feingold, an individual may contribute up to $2,600 to any individual

candidate's campaign, but may only give an aggregate total of $48,600 to candidates. This means an individual who, for example, wants to help every Republican or Democrat in a competitive House race with a maximum contribution, cannot. That contributor would only be able to support nine candidates to the legal maximum, if he donates in both the primary and general election campaigns.

McCutcheon is not challenging the amount he can give to any one candidate, but the restriction on his ability to support more candidates. This restriction doesn't make any sense. If the first nine candidates aren't corrupted by accepting the maximum contributions, what is so different about candidate number ten? He thinks, and we agree, that the First Amendment allows him to associate with as many candidates as he likes, and to spread messages he supports as far as he can.

The Republican National Committee (RNC), co-plaintiff in Mr. McCutcheon's case, raises the same issue about party committees. The law only allows an individual to contribute $32,400 to a national political party committee and $5,000 to a PAC, but also imposes an overall limit of $74,600 on all such contributions. So an individual can give the maximum legal contribution to both the RNC and the National Republican Senatorial Committee, but if he does so, he can't give the otherwise legal maximum to the National Republican Congressional Committee.

So what is the real justification for this arbitrary restriction? After all, if Congress is going to pass a law abridging freedom of speech, it would seem there has to be a good reason. The Court has said that preventing corruption or its appearance is a valid reason for restricting candidate contributions. This is where things get interesting.

Our brief notes that "no record exists" for the justification of the law during its consideration by Congress. "Despite extensive research, amicus could locate no record regarding any of [McCain-Feingold's] aggregate limits" that explained why such limits are needed to prevent corruption or its appearance and why such a limit would not affect First Amendment rights. The brief concludes that "Based on this review of the public record, amicus submits that no member of Congress made any substantive representation as to the purpose of the aggregate limits."

Furthermore, the brief notes, "Neither the lower court nor the FEC offered any evidence supporting the contention that the individual aggregate limits address either corruption or a credible threat of circumvention."

The Supreme Court has consistently said that because contribution limits implicate the First Amendment, judges must submit them to a heightened standard of review. Deference to Congress, especially in the absence of any substantive record, is inconsistent with the judiciary's duty to defend our First Amendment liberties from legislative overreach.

CCP is counsel in another challenge to aggregate limits before the Supreme Court. That lawsuit, *James v. FEC* (No. 12-683), is premised on different facts and a different legal argument and the Court has deferred action on the case until it rules on McCutcheon. If McCutcheon wins, James will win her case. However, James can still win if McCutcheon loses.

You can view our amicus brief in *McCutcheon v. FEC* at this link, and our jurisdictional statement in *James v. FEC* at this link.